Elizabeth Chiew Yee Fung & Ors v Leong Fook Ngen & Ors

HIGH COURT (TAWAU) — CIVIL SUIT NO 328 OF 1987
RICHARD MALANJUM J
20 FEBRUARY 2001

Land Law *— Indefeasibility of title and interests — Forged transfer — Standard of proof — Whether signature of transferor was a forgery and thus fraudulent — Effect of forged instrument — Knowledge of forgery, whether knowledge could be imputed — Whether good title passed — Whether doctrine of bona fide purchaser and for valuable consideration applied*

The plaintiffs prayed for the following relief, inter alia, a declaration that the signature of Johnny Chiew Tet Ming ('the deceased') in the memorandum of transfer ('exh P3a') for Lease No 115138488 ('the land') was a forgery and a declaration that the $^{1}/_{10}$ undivided share ('the share') of the deceased subsequently registered to Liew Ah Tai, Leong Fook Ngen and the third defendant was null and void. The defence filed for the third defendant was that it was a bona fide purchaser for value without notice and that it had no knowledge of the forgery as alleged. During the course of proceedings, only the first plaintiff pursued the claim as the other plaintiffs withdrew as parties. Subsequently, the second defendant proceeded to withdraw the defences for the first and second defendants thereby leaving only the third defendant. A handwriting expert (PW1) testified that the signature appearing in exh P3a differed from that of the usual signature of the deceased appearing in the 19 specimen signatures given. Another witness for the plaintiff, Liew Fook Ngen (PW6), testified that David Wang, the former managing director of the third defendant, told him that it was him (David Wang) who forged the signature of the deceased and he also gave the background as to why David Wang was interested in having the whole of the land. The issues for determination were: (i) whether the signature of the deceased was a forgery and thus fraudulent; (ii) whether the third defendant had knowledge of it; and (iii) whether the subsequent registered owners could obtain and pass good title despite the forgery.

Held, judgment for the plaintiff with costs to be taxed:

(1) The standard of proof required where there is an allegation of fraud must be one of beyond reasonable doubt. The standard of proof required where there is an allegation of forgery is one on the balance of probabilities. Where an allegation is one of forgery the facts and circumstances in relation to the part played by a party or parties alleged to have been involved in the forgery should be taken into account (see pp 408G, 409E–F).

(2) The court was satisfied on the balance of probabilities that the purported signature of the deceased as found in exh P3a was the result of a forgery. As there was then a transfer of the share using the forged signature of the deceased, the court was satisfied beyond reasonable doubt that there was fraudulent conduct perpetrated in such transfer (see p 414B–C).

(3) The knowledge of forgery could be imputed to the managing director of the third defendant at the material time, namely, David Wang. From the evidence adduced in this case there was no dispute of the involvement of the said David Wang in the transfers of the share. The surrounding circumstances emanating from the evidence adduced in connection with the transfer of the share would be more than sufficient to lead to a conclusion that David Wang must have known or ought to have known of the falsity of the purported signature of the deceased on exh P3a (see p 414D–E, H).

(4) A forged instrument is null and void and of no effect. It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. As the purported signature of the deceased in exh P3a was forged and the third defendant must have known or ought to have known of the forgery, the inevitable conclusion was that such instrument did not convey any title, interests or rights to the subsequent registered owner. As such, Liew Ah Tai, Leong Fook Ngen and the third defendant acquired no title, interests or rights in respect of the share (see p 415C–D, F–G).

(5) The fact that the court found the third defendant to have knowledge or ought to have known of the forgery of the purported signature of the deceased rendered the defendant no longer entitled to rely on the doctrine of bona fide purchaser and for valuable consideration (see p 416A–B).

[Bahasa Malaysia summary

Plaintif-plaintif memohon untuk relif-relif berikut, antara lain, satu deklarasi bahawa tandatangan Johnny Chiew Tet Ming ('si mati') dalam memorandum pindahmilik ('eksh P3a') untuk Pajakan No 115138488 ('tanah tersebut') adalah satu pemalsuan dan satu deklarasi bahawa $^{1}/_{10}$ bahagian si mati yang tidak dibahagikan ('bahagian tersebut') yang kemudiannya telah didaftarkan kepada Liew Ah Tai, Leong Fook Ngen dan defendan ketiga adalah batal dan tak sah. Pembelaan yang telah difailkan untuk defendan ketiga adalah bahawa ia adalah pembeli bona fide bernilai tanpa notis dan bahawa ia tidak mempunyai apa-apa pengetahuan tentang pemalsuan yang dikatakan. Semasa prosiding dijalankan, hanya plaintif pertama meneruskan tuntutan kerana plaintif-plaintif lain telah menarik diri

sebagai pihak-pihak terlibat. Selepas itu, defendan kedua seterusnya telah menarik balik pembelaan-pembelaan untuk defendan-defendan pertama dan kedua dengan itu meninggalkan hanya defendan ketiga. Seorang pakar tulisan tangan (PW1) memberikan keterangan bahawa tandatangan yang terdapat dalam eksh P3a berbeza daripada tandatangan biasa si mati yang terdapat dalam 19 spesimen-spesimen tandatangan yang telah diberikan. Seorang lagi saksi plaintif, Liew Fook Ngen (PW6), memberikan keterangan bahawa David Wang, bekas pengarah urusan defendan ketiga, telah memberitahu beliau bahawa David Wang telah memalsukan tandatangan si mati dan beliau juga memberikan latar belakang kenapa David Wang berminat mendapatkan keseluruhan tanah tersebut. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada tandatangan si mati adalah satu pemalsuan dan oleh itu fraud; (ii) sama ada defendan ketiga mempunyai pengetahuan tentangnya; dam (iii) sama ada pemilik-pemilik berdaftar berikutnya boleh memperoleh dan menyerahkan hakmilik yang baik walaupun terdapat pemalsuan tersebut.

Diputuskan, penghakiman untuk plaintif dengan kos untuk ditaksir:

(1) Standard pembuktian yang dikehendaki di mana terdapat satu dakwaan fraud mestilah melampaui keraguan munasabah. Standard pembuktian yang dikehendaki di mana terdapat satu dakwaan pemalsuan adalah atas imbangan kebarangkalian. Di mana dakwaan tersebut adalah tentang pemalsuan, fakta-fakta dan keadaan berhubung peranan yang dimainkan oleh satu pihak atau pihak-pihak yang didakwa terlibat dalam pemalsuan hendaklah diambilkira (lihat ms 408G, 409E–F).

(2) Mahkamah berpuas hati atas imbangan kebarangkalian bahawa tandatangan si mati yang dimaksudkan sebagaimana yang terdapat dalam eksh P3a adalah hasil satu pemalsuan. Memandangkan terdapat satu pindahmilik bahagian yang menggunakan tandatangan si mati yang dipalsukan, mahkamah berpuas hati melampaui keraguan munasabah bahawa terdapat perbuatan fraud yang telah dilakukan dalam pindahmilik tersebut (lihat ms 414B–C).

(3) Pengetahuan tentang pemalsuan boleh disebabkan oleh pengarah urusan defendan ketiga pada masa matan, iaitu, David Wang. Daripada keterangan yang dikemukakan dalam kes ini, tiada pertikaian tentang penglibatan David Wang dalam pindahmilik bahagian tersebut. Keadaan sekeliling yang datangnya daripada keterangan yang dikemukakan berkaitan dengan pindahmilik bahagian tersebut lebih daripada mencukupi untuk tiba kepada satu kesimpulan bahawa David Wang mestilah telah mengetahui atau sepatutnya mengetahui tentang pemalsuan tandatangan si mati yang dimaksudkan tersebut pada eksh P3a (lihat ms 414D–E, H).

(4) Satu instrumen yang dipalsukan adalah batal dan tak sah dan tiada kesan. Ia bukan hanya boleh batal. Dengan ketiadaan apa-apa arahan statutori yang nyata yang bertentangan, tiada hak apa sekalipun timbul menyebelahi seseorang yang memperoleh hakmilik di bawah satu instrumen yang batal. Memandangkan tandatangan si mati yang dimaksudkan tersebut dalam eksh P3a telah dipalsukan dan defendan ketiga mestilah telah mengetahui atau sepatutnya mengetahui tentang pemalsuan tersebut, kesimpulan yang pasti berlaku adalah bahawa instrumen sedemikian tidak memberikan apa-apa hakmilik, kepentingan atau hak kepada pemilik berdaftar yang berikutnya. Oleh itu, Liew Ah Tai, Leong Fook Ngen dan defendan ketiga tidak memperoleh hakmilik, kepentingan atau hak berhubung bahagian tersebut (lihat ms 415C–D, F–G).

(5) Hakikat bahawa mahkamah mendapati defendan ketiga mempunyai pengetahuan atau sepatutnya mengetahui tentang pemalsuan tandatangan si mati yang dimaksudkan tersebut menyebabkan defendan tidak lagi berhak bergantung kepada doktrin pembeli bona fide dengan balasan bernilai (lihat ms 416A–B).]

Notes

For cases on forged transfer, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2504–2508.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241) (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62 (refd)

Borneo Housing Mortgage Finance Bhd v Times Engineering Bhd [1996] 2 MLJ 12 (refd)

Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61 (refd)

Kreditbank Cassel GMBH v Schenkers Ltd [1927] 1 KB 826 (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)

Legislation referred to

National Land Code 1965 s 340(3)

Sabah Land Ordinance

Victor Chong (*Poh & Victor Chong*) for the plaintiff.

Liew Chiew Chai (*CC Liew & Co*) for the third defendant.

Richard Malanjum J:

Introduction

In this action the plaintiffs pray for the following relief, namely:

(1) damages for fraud;
(2) a declaration that the signature of Johnny Chiew Tet Ming in the memorandum of transfer (MTI) was a forgery;
(3) a declaration that the interest subsequently registered as Memorial Nos 30187763, 30188261 and 30192346 on CL 138488, Lahad Datu are null and void;
(4) an order that the collector of land revenue cancel the said Memorial Nos 30187763, 30188261 and 30192346 entered on the title deed CL 138488, Lahad Datu;
(5) all other necessary accounts, directions, declarations, orders and enquiries;
(6) further or other relief; and
(7) costs.

All the original defendants resisted the claim and basically the defence filed for the third defendant in particular was that it was a bona fide purchaser for value without notice and that it had no knowledge of the forgery as alleged.

Now this case has a chequered history. It first came up for hearing in 1993 but after the first witness for the original plaintiffs was called it had to be adjourned on the application of the original plaintiffs since they could not get their other witnesses. The application was duly granted with liberty to apply for reinstatement once the parties were ready. But such application was only made in 1999 and hence the hearing resumed with the original second to the sixth plaintiffs withdrawing as parties leaving only the first plaintiff to pursue the claim. Thus, for the purpose of this judgment it is to be understood that the plaintiff means the original first plaintiff. The former judge that initially heard this case was also transferred to another station and hence the duty fell upon me to continue the hearing when there was no objection of any sort from the parties involved. The other new development in the case was that the first defendant had passed away and the second defendant was therefore substituted as the personal representative of her estate. But having settled that issue the second defendant proceeded to withdraw the defences for both of them thereby leaving only the third defendant. As such the matter left to be determined is only between the plaintiff and the third defendant that will be referred to in this judgment as the defendant.

The plaintiff's case

It is the plaintiff's case that the $^{1}/_{10}$ undivided share ('the said share') in a parcel of land contained in Country Lease No 115138488 ('the said land') situated in the District of Lahad Datu is still in law belonging to the estate

of the late Johnny Chiew Tet Ming (the deceased) who passed away on 30 April 1980 although it is now registered under the name of the defendant. It is the evidence of PW5, Elizabeth Chiew that her father never transferred the said share to one Liew Ah Tai and that the alleged signature of the deceased in the purported memorandum of transfer (exh P3a) was forged. And PW6, Liew Fook Ngen testified that David Wang, the former managing director of the defendant, told him that it was him (David Wang) who forged the signature of the deceased. Accordingly, the PW6 David Wang wanted the said share in order to proceed with the development of the said land. So the plan was to transfer the said share firstly to Liew Ah Tai since she was the former owner prior to transferring it to the deceased for love and affection. Thereafter the said share was transferred to PW6 and finally to the defendant. As for the evidence of PW2, Chong Hen Fui, he said that he was assigned by David Wang to arrange for the registration of the transfers in respect of the said share. The evidence of PW1, Siow Kwen Sia, called as a handwriting expert, concluded that the signature appearing in exh P3a differed from that of the usual signature of the deceased appearing in the 19 specimen signatures given.

The defendant's case

Shortly put, it is the defence of the defendant that it was a bona fide purchaser for value without notice and that it had no knowledge of the alleged forgery. It was also contended that the defendant was the third purchaser and no knowledge of the forgery should be attributed to it. It is unfortunate however that the main players in the transaction are now dead, including Wang.

The issues

It is a common ground that in order for the plaintiff to succeed it must be proved that: (i) the signature of the deceased, namely, Johnny Chiew Tet Ming in exh P3a as a transferor was a forgery and thus fraudulent; and (ii) that if it was a forgery, the defendant had knowledge of it. The ancillary point is whether the subsequent registered owners could obtain and pass good title despite the forgery.

Issue (i)

It is trite law that the standard of proof required where there is an allegation of fraud must be one of beyond reasonable doubt. In the case of *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34, it was held by the then Supreme Court, per Syed Agil Barakbah SCJ at p 38 that:

> … fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93; *Saminathan v Pappa* [1981] 1 MLJ 121). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular

A case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. (See 'proved' at s 3 of the Evidence Act 1950 and *Liew Kaling & Ors v PP* [1960] MLJ 306.)

However, the matter before me is an allegation of forgery. And it was held by the Court of Appeal that the standard of proof required should only be on the balance of probabilities, a standard generally applied in civil cases. In *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, his Lordship Gopal Sri Ram said this at p 75:

> The proof of forgery in civil proceedings, unlike fraud, comes within the general rule earlier adverted to. That it need only be established on a balance of probabilities was laid down as long ago as 1855 by the Privy Council in *Doe D Devine v Wilson* (1855) 14 ER 581, where Sir John Patteson, when delivering the advice of the Board said (at p 592):
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> 'Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weight the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case, the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.'

On appeal, the Federal Court approved the standard of proof required for forgery as expounded by the Court of Appeal, that is, on the balance of probabilities (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241).

It is also pertinent to note that where an allegation is one of forgery the facts and circumstances in relation to the part played by a party or parties alleged to have been involved in the forgery should be taken into account.

Further, when considering whether forgery has been established:

> '[It] is not proper to attempt making any conclusion on the genuineness of a signature in a document by comparing two similar handwriting without resorting to the opinion of a handwriting expert who is specialised in this field.... It is insufficient to rely on the opinion of an ordinary witness and the more so an interested party': per Syed Agil Barakbah SCJ at p 36 in *Chu Choon Moi v Ngan Sew Tin*.

As regards the evidence of a witness where such witness may be found to be unreliable, 'it does not mean that all his evidence had to be rejected. The trial court could still consider and accept any part of his evidence which are corroborated by independent evidence, documentary or otherwise': per Syed Agil Barakbah SCJ at p 37 in *Chu Choon Moi v Ngan Sew Tin*.

The plaintiff in an attempt to establish this first issue called several witnesses, including a handwriting expert in the person of PW1, a forensic scientist by the name of Mr Siow Kwen Sia. Now, in considering the

evidence of PW1 this court has to note that generally his evidence should be admitted without any requirement of corroboration. In *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, his Lordship Anuar CJ (Malaya) said thus, inter alia, at pp 85–89:

> [It] is trite law that the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or eyewitness … . The learned judge should have considered the reasoning given by the expert and with that assistance arrived at the conclusion. In failing to do so the learned judge had abdicated his function. The learned judge is entitled to reject the evidence but not before considering such evidence. The evidence of the expert is admissible and relevant to the fact in issue properly placed before the learned judge. The learned judge ought to consider all such evidence that is before him prior to arriving at a finding on the issue. Only after such due consideration been given could he come to a finding. In the case before us, the learned judge did not consider the evidence of PW1 at all. The learned judge did not determine the issue of the forgery.

In the present case, there was challenge by the defendant either on the qualification of PW1 as an expert or on the method adopted in coming to his conclusion. The basic complaints in fact were that PW1 failed to give evidence to cover the situation where a person might have purposely signed differently from his usual signature and that no specimen was produced for the month of October 1975 when the alleged forgery purportedly took place. Meanwhile, it was the testimony of PW1 that in considering the signature appearing in exh P3a purportedly to be that of the deceased he compared it with 19 specimen signatures of the deceased from the years 1968 to 3 August 1978 (exhs P8–18). It was the opinion of PW1 that the signatures in those 19 specimens were written by the same hand. In respect of the signature in exh P3a, however, he was of the opinion that it was of different authorship. In fact, PW1 prepared a report that was duly admitted as exh P7.

Accordingly, in view of the total absence of any form of challenge against the evidence of PW1 as to his expertise and method adopted to examine the disputed signature and having considered the overall testimony of PW1, I have no reason to reject his evidence as a whole. Indeed the defendant did not deem it necessary to call its own expert to counter the finding of PW1.

In respect to the complaints of the defendant, I find that they were addressed in the course of cross-examination and re-examination of PW1. It was his answer that the person signing purportedly the signature of the deceased was not one that was trying to disguise a signature. As to the absence of a specimen for the month of October 1975, I do not think that it is fatal as the period covered by the specimen signatures is more than sufficient to remove any probable doubt. The vital point is that PW1 testified that the author of the purported signature of the deceased in exh P3a was trying to disguise a signature and that the author of the 19 specimen signatures differed from that of the purported signature of the deceased in exh P3a.

A The next relevant witness is PW6 — Leong Fook Ngen, the second defendant. It was the evidence of PW6 that when he met David Wang and asked about the signatures on exh P3a purportedly to be that of the deceased and the attesting witness who was also dead, the latter told him that he (David Wang) had fabricated and forged both the signatures. PW6 also gave the background as to why David Wang was indeed interested in B having the whole of the said land. It was for development and that PW6 would get one shop lot as his share. In fact, it was the testimony of PW6 that he was supposed to get two shop lots since he had also put down a deposit of RM30,000 by way of contra account with the defendant for a second lot.

Learned counsel for the defendant heavily criticized the credibility and C reliability of PW6 in that he seemed to remember only those that he wanted to. In particular learned counsel said that PW6 failed to mention to the police about the forgery when he was interviewed earlier on and only mentioned it in his statutory declaration (exh P25) and in his statement to the court (PW6–A). It was also highlighted by learned counsel for the defendant that PW6 seemed to have three versions of the transaction D pertaining to the transfer of the said share, in particular in connection with the payment of RM30,000. The first version was that PW6 was supposed to have been paid the sum of RM30,000 by the defendant plus a shop lot but none materialized. The second version was that the defendant paid the sum but PW6 returned it as a deposit for a shop lot. And this version came out when PW6 was shown a receipt. The third version was that the sum of E RM30,000 was the consideration for the said share. Learned counsel submitted that if there was any truth in what was said by PW6, then there was no explanation for his failure to demand from the defendant for the said sum and the shop lot.

As regards what transpired between PW6 and David Wang, learned F counsel said that it should not be admitted as such statement was hearsay. And it was also contended that there was discrepancy between the evidence of PW6 and that of PW2 in connection with the time taken in the transfer of the said share. Finally, learned counsel said that the whole purpose of PW6 in testifying was to help the plaintiff.

G Having considered the testimony of PW6 as a whole, I did find discrepancies. But I do not think they are serious enough as to warrant this court to reject his evidence in entirety. There are portions of his testimony in particular as to the background fact of the impugned transaction that the defendant could have rebutted but failed. And there are portions of the evidence of PW6 that are well corroborated by events not disputed by the H defendant. For instance, there was a mention by PW6 of a person by the name of Tan Sung Jung who was present when Liew Ah Tai signed as a transferee in exh P3a. The defendant could have denied this event by calling the said Tan Sung Jung. Further, there was also no challenge to the assertion of PW6 of the pivotal role played by David Wang in the transfer of the said share. At any rate, the defendant could not have done so as it was I not disputed that David Wang was at all times in possession of the title deed in respect of the said land. Indeed, exh P3a had to go through the hand of David Wang and it was him who made the arrangement with PW2 to lodge

the transfer with the Lands and Surveys, Kota Kinabalu. As regards the statement heard by PW6 from David Wang, I do not think it should be strictly taken as hearsay since it was PW6 himself personally who heard it. Further, I agree with learned counsel for the plaintiff that such a statement could amount to an admission on the part of David Wang. And the other surrounding circumstances that gives credence to the testimony of PW6, namely, that there was fabrication, is on the reference to the payment receipts. The defendant relied quite heavily on the existence of the receipts as indication that the deceased indeed signed on exh P3a. However, on the production of those receipts they did not tally at all with the execution of the said document. They referred to other matter such as plan printing fees. And the names mentioned therein were not even any of the parties to the transaction. There lies a glaring situation that lends support to the account of PW6 as to how the event unfolded at the Land Office in Lahad Datu in 1984 and the representation or assurance given by David Wang.

Accordingly, I am inclined to accept the unrebutted as well as those portions of the evidence of PW6 that were corroborated by the documents and circumstances adduced during the hearing of this case. As a whole, I would say that portions of the evidence of PW6 should be helpful in determining whether there was forgery of the signature of the deceased.

The testimonies of PW2, Chong Hen Fui and PW3, Chong Shin Leong mainly touched on the transfers involving the said share. It was the evidence of PW2 that he handled all the three transfers involving the said share in 1984 and 1985 on the instruction of David Wang. The transfers of the said share were from the deceased to Liew Ah Tai and then from Liew Ah Tai to PW6, Leong Fook Ngen and finally to the defendant. According to PW2 he only dealt with David Wang in all the transfers. As for the evidence of PW3 it was more to confirm that PW2 acknowledged receiving in 1984 title deeds of which among them was the title deed of the said land as recorded in the dispatch book of the lands and surveys department.

PW4, Alexander Yong and PW7, Bernard Liew Chan Min testified relating to the production of the receipts (exh P 26) referred to in exh P3a.

Finally, the evidence of PW5, Elizabeth Chiew Yee Fung who is a daughter of the deceased dealt with the signature in exh P3a. According to this witness she lived with her father for about five years and whilst with him she helped him in his business. She said that she was familiar with the signature of her father and having seen the purported signature in exh P3a this witness said that it was not the signature of her father. PW5 also described how she first stumbled on the matter after the demise of her father. She said that the said share was listed as part of the estate of the deceased. And in 1985 she and her brother went to Lahad Datu to meet their grandfather with the view to ask him to look for a developer of the said share. However before the plan could be done her grandfather told her that the said share was no longer in the name of the deceased but that of Liew Ah Tai. Not happy with such information PW5 returned to Sabah in 1986 to lodge a police report. And in 1987 she instructed her then solicitors to commence legal action.

A This witness also said that during her stay with her father between 1974 and 1978 she noted that David Wang always came to see her father to persuade him to sell the said share to him. But her father did not want to sell it. It was also disclosed by this witness that in 1979 her late father had the said share valued by a property valuer of Messrs CH Williams Talhar & Wong (Sabah) Sdn Bhd.

B For the defendant DW1 — William Wang was called to testify. He said that he is now the managing director of the defendant after the death of his father, David Wang, on 13 February 1996. And this witness said that before the transfer of the said share to the defendant his late father had 13/40 share in the said land. As such, the title deed was in his possession. For that C reason, all transactions had to go through his father. And PW2 was relied upon as the agent of his father who wanted to ensure that the deed would be returned to him.

Having considered the evidence adduced as a whole on this issue (i), I am of the view that the facts and circumstances in this case as can be D elicited inevitably point to one conclusion in that there was forgery of the purported signature of the deceased appearing in exh P3a. As to the time and by whom I do not think that is crucial to determine. The evidence of PW1 including his report lends support to such a finding. I have no reason to doubt the probative value of the evidence of this witness. I am also fortified by the fact that there appears to be no serious challenge coming E from the defendant to the allegation that the purported signature of the deceased in exh P3a was forged. Further, I have no reason not to accept that PW1 is an expert and duly qualified to give such evidence.

One circumstances that helps to clear any doubt is the attempt to show that the necessary fees had been paid by quoting the receipts numbers. F However, it had been shown that those mentioned receipts did not support such assertion. Those receipts did not indicate that they were related to the transfer of the said share. And the evidence of PW6 meanwhile showed that it was David Wang who assured him that all the requirements were met thereby giving the appearance that the signatures of the deceased and the attesting witness were genuine. Obviously, someone did forge the purported G signature of the deceased and even went to the extent of getting false receipts numbers so as to camouflage the wrongdoing. Incidentally, I am inclined to accept the evidence of PW6 in respect of what transpired during his meeting with David Wang at the land office in Lahad Datu in connection with the transfer of the said share to Liew Ah Tai. I do not think H this witness would go to the extent of inventing a story that is prejudicial to his interest to begin with. He has all to gain should the said share remains with the defendant since according to him there was a promise of one shop lot. Further, I am not prepared to accept that David Wang was involved only due to the fact that he was holding the title deed of the said land as DW1 might want this court to believe. I tend to accept what was said by I PW6 as to the background and the reason for David Wang to be interested in acquiring the said share. Indeed this aspect of the evidence is in tandem with the evidence of PW5 regarding the constant persuasion of David Wang

for the deceased to sell the said share. It was not a case of David Wang having totally no interest in acquiring it.

Although I am not obliged in law to conclude based on what PW5 had said regarding the purported signature of the deceased in exh P3a, having considered it in the light of the other evidence adduced I am of the view that her evidence should be given some weight in that she must be taken to be familiar with the signature of the deceased having seen it before during her stay with him. And it was the evidence of PW5 that the purported signature of the deceased in exh P3a was not his. I have no reason not to accept such assertion.

Accordingly, I am satisfied on the balance of probabilities that the purported signature of the deceased as found in exh P3a is the result of a forgery. And as there was then a transfer of the said share using the forged signature of the deceased, I am satisfied beyond reasonable doubt that there was fraudulent conduct perpetrated in such transfer.

Issue (ii)

The next issue is whether the defendant knew of the forgery on or before the transfer of the said share. In this case, the knowledge can be imputed in the managing director of the defendant at the material time, namely, David Wang.

From the evidence adduced in this case, there was no dispute of the involvement of the said David Wang in the transfers of the said share, to wit, first from the deceased to Liew Ah Tai and then from Liew Ah Tai to Leong Fook Ngen and finally from Leong Fook Ngen to the defendant. Of course, the explanation of DW1 was that David Wang was holding the title deed of the said land being the holder of $^{13}/_{40}$ share thereof. However, from the testimony of PW6 I find the role of David Wang in making the transfer possible was quite perplexing. And I heard no other assertion that the documents needed for the transfer of the said share were prepared by another person or that David Wang had nothing to do with them. Indeed it was never put to PW6 in cross examination that the purported signature of the deceased in exh P3a was secured by him or that he was responsible in passing the same to David Wang. In fact the assurance made by David Wang to PW6 on the arrangement for the transfer of the said share, namely, that no one would be in trouble since both the deceased and the attesting witness were dead rendered a clear knowledge of David Wang on the status of the signatures of the deceased in exh P3a. It is of course unfortunate that David Wang could no longer come to court to tell his version of the story since he passed away on 13 February 1996. But I think the surrounding circumstances emanating from the evidence adduced in connection with the transfer of the said share would be more than sufficient to lead to a conclusion that David Wang must have known or ought to have known of the falsity of the purported signature of the deceased in exh P3a.

The evidence of PW2 also showed the extent of the role played by David Wang in the transfer of the said share. PW2 met no one else other than him. It was obvious that the conduct of David Wang in relation to the

transfer of the said share could not be described as anything else other than of a person who was very keen to acquire the same.

Accordingly, it is my finding that the defendant through the knowledge of its then managing director, David Wang, must have known or ought to have known that the purported signature of the deceased in exh P3a was forged.

Issue (iii)

This issue is a question of law, namely, whether a forged instrument of transfer conveys any title, interests or rights to subsequent purchaser upon registration. To begin it should be appreciated that under the Sabah Land Ordinance there is no provision on indefeasibility of title on registration similar to that is found in the National Land Code 1965 ('the NLC'). This has been affirmed in the case of *Borneo Housing Mortgage Finance Bhd v Times Engineering Bhd* [1996] 2 MLJ 12.

Next, 'it is axiomatic that a forged instrument is null and void and of no effect' (see *Kreditbank Cassel GMBH v Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. The extent to which statute has intervened in the case of a registration of title obtained by means of a forged instrument is a matter that we will deal with separately at a later stage' per Gopal Sri Ram JCA in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* at p 85.

Perhaps it should be noted here that the Federal Court reversed the decision of the Court of Appeal in the above case but it was on the basis of the proviso under s 340(3) of the NLC, namely, a purchaser in good faith and for valuable consideration.

In the instant case, I have found that the purported signature of the deceased in exh P3a was forged and that the defendant must have know or ought to have known of the forgery. Hence, the inevitable conclusion is that such instrument did not convey any title, interests or rights to the subsequent registered owner. As such, Liew Ah Tai, Leong Fook Ngen and the defendant acquired no title, interests or rights in respect of the said share.

It was also submitted that the defendant was a bona fide purchaser for value without notice of the forgery. In so far as the notice is concerned, I have already discussed it hereinabove and made a finding accordingly. The remaining point is whether the defendant was a bona fide purchaser and for valuable consideration. Here lies the evidence of PW6 who said that he was promised RM30,000 but never came. He also said that he was persuaded by David Wang to sign an acknowledgement receipt on the RM30,000 after the plaintiff had commenced this action on the representation by the former that it would prevent anyone from getting into trouble. David Wang promptly ignored PW6 after he had signed the same. According to PW6, he was also promised a shop lot as part of the consideration for the said share but to date nothing came out of it.

On the part of the defendant, it could only rely on the acknowledgement receipt signed by PW6. However, I am inclined to accept the explanation of PW6 on how the receipt came about. At any rate, the fact that I have found the defendant to have knowledge or ought to have known of the forgery of the purported signature of the deceased renders the defendant no longer entitled to rely on the doctrine of bona fide purchaser and for valuable consideration. And I do not think the conclusion in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* is of any help to the defendant since there the Federal Court relied on the said proviso of s 340(3) of the NLC. There is no equivalent subsection or proviso in the Sabah Land Ordinance. Moreover, I am not satisfied on the balance of probabilities that the defendant has discharged its burden of proof as required by the said doctrine (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465).

Conclusion

In view of the findings that I have arrived at hereinabove, the irresistible conclusion is that the plaintiff has succeeded in establishing her case while the defendant failed in an attempt to substantiate its defence. As such, judgment should therefore be given in favour of the plaintiff and against the defendant. And since the original first and second defendants did not contest this action judgment should also be entered against them. Accordingly, I hereby grant the plaintiff the following orders as finally prayed for, namely,:

(i) a declaration that the signature of Johnny Chiew Tet Ming in memorandum of transfer (exh P3a) is a forgery;

(ii) a declaration that the interests subsequently registered as Memorial Nos 30187763, 30188261 and 30192346 on CL 138488, Lahad Datu are null and void; and

(iii) that the collector of land revenue cancels the said Memorial Nos 30187763, 30188261 and 30192346 entered on the title deed CL 138488, Lahad Datu.

I am aware that the plaintiff initially prayed for damages for fraud. However, learned counsel did not pursue that item at the submission stage. At any rate I do not think he could have succeeded as I heard no evidence adduced to substantiate such a claim.

On the issue of costs, I award it to the plaintiff against the defendant as well as the original first and second defendants to pay equally and to be taxed unless agreed.

Judgment for the plaintiff with costs to be taxed.

Reported by Moy Saw Han